

IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
CIVIL SUIT NO.: BA-22NCVC-384-06/2017

BETWEEN

SPORTY BEANS SDN BHD ...
[COMPANY NO.: 1169554-D]

PLAINTIFF

AND

1. **ASAP BERHAD** ... DEFENDANTS
[COMPANY NO.: 812786-H]
2. **ASAP PROPERTIES SDN BHD** ...
[COMPANY NO.: 1070059-T]

(IN THE ORIGINAL ACTION)

BETWEEN

SANCY TECHNOLOGIES SDN BHD ...
[Formerly known as ASAP properties Sdn Bhd]
[Company No.: 1070059-T]

PLAINTIFF

AND

1. **SPORTY BEANS SDN BHD** ...
DEFENDANTS
[COMPANY NO.: 1169554-D]
2. **RAMESH SIVARAJ A/L RAJASINGAM CHELLIAH** ...
[NRIC NO.: 680401-08-5001]
3. **USHADEVI A/P VELAYUTHAM** ...
[NRIC NO.: 690930-03-5658]



**4. GERARD MOHANRAJ PILLAI
[NRIC NO.: 711109-04-5255]**

(IN THE COUNTERCLAIM)

JUDGMENT

Introduction

1. This case demonstrate the perils of beginning work without a signed written agreement. At the behest of Sporty Beans Sdn Bhd ("the plaintiff ") work was done for the creation of an e-portal before the existence of a signed written agreement. A dispute has arisen between the plaintiff and the first and second defendants in regard to who were the contracting parties and what were the agreed terms.

Case for the Plaintiff

2. The plaintiff says it had it had entered into a joint venture agreement ("JV agreement") with the first defendant, Asap Berhad on or around November 2016 for the development/design of an e-portal known as "skola.my" ("the e-portal"). It alleges that Asap Berhad breached the JV agreement by disabling the e-portal on or around 5 January 2017.
3. It seeks damages for the losses suffered as a result of this breach.



4. In the alternative, the plaintiff claims that in the event the court finds that the JV agreement was between it and the second defendant, Asap Properties Sdn Bhd (“Asap Properties”), both Asap Properties and Asap Berhad are jointly liable for the losses as the latter is the alter ego of the former.

Case for the Defendants

5. Asap Berhad takes the position that it was not a party to the JV agreement and that it has been wrongly sued. It is supported in this position by Asap Properties who says that the JV agreement was between it and the plaintiff.
6. Asap Berhad also denies that it is the alter ego of the Asap Properties.
7. Asap Properties alleges that it was a term of the JV agreement that the plaintiff would pay it RM50,000.00 upon the execution of the JV agreement being the anticipated cost of deploying and launching the My Juara e-portal and that a JV company would be set up to manage the e-portal. It alleges that it deactivated the e-portal as the plaintiff failed to make this payment in breach of the JV agreement.
8. Asap Properties also counterclaims for damages against three individuals and the plaintiff for conspiracy to injure. The counterclaim is premised on the allegation that the plaintiff had breached the spirit of the joint venture completely, whereby the JV



company was not formed nor was the e-portal (My Juara) launched. The individuals involved are as follows:

- a. Ramesh Sivaraj a/l Rajasingam Chelliah ("Ramesh")
 - b. Ushadevi a/p Velayutham
 - c. Gerard Mohanraj Pillai ("Gerry")
9. Ramesh, Usha Devi and Gerry deny the allegation of conspiracy in their defence. Gerry also counterclaims for damages for emotional and mental stress suffered due to the filing of the frivolous suit against him.

Background Facts

10. The plaintiff is a locally incorporated company involved in the business of providing services to schools. Ramesh and his wife Usha Devi are directors in the plaintiff.
11. Asap Berhad is a software solution company focusing in asset and facility management. Asap Properties is a MSC status company dealing with software. One Prabuddha Kumar Chakraverty ("Chaks") was a director in Asap Berhad and Asap Properties at all material times.
12. The resources of Asap Berhad (office space, telephone, fax, office equipment and facilities, human capital) were shared with Asap Properties for Asap Properties' e-commerce business. At all



material times, the legal manager and Chief Operating Officer of Asap Berhad were Alan Michael Rozario (“Alan”) (DW2) and Gerry, respectively.

13. In or around early October 2016, the plaintiff represented by Ramesh met Chaks (DW3) at the Bukit Kiara Equestrian Club, Kuala Lumpur. Ramesh was introduced to Chaks by one Venkatesh Prabhu Thirumurty (“Prabhu”), an employee with Asap Berhad.
14. At this meeting Ramesh showed Chaks the My Juara programme for schools. The discussions were towards settling up of an e-portal to sell products.
15. On 21 October Prabhu sent an email (exhibit P34) to Ramesh that read, “I spoke to Chaks and he is busy leaving to overseas. He will sort it out your whatsapp message and move forward. By next week Monday Allan will look into it the agreement between Sporty Beans & Asap berhad to be modified accordingly.”
16. On 25 October 2016, Ramesh sent a whatsapp message to Alan enquiring, “Good evening Alan. Kindly, indicate when you can send me the revised draft as I am meeting my Chairman on Thursday. Kindly revert.” Alan responded, “Hi Ramesh, I should be able to send you a draft by tomorrow evening FYI Chaks has asked me to put jv co for the portal and pack everything in the jv so it will be different than the draft you have - hence the need to



re - draft. Ramesh replied "okay".

17. On 26 October 2016, Alan sent an email entitled "Subject: Draft JV Ag-ASAP Prop & Sporty Beans" to Ramesh. It read:

"Hi Ramesh,

Pls find attached the draft joint venture agt for the proposed e-portal between ASAP Prop & Sporty Beans FY perusal."

18. On 27 October 2016, Prabhu sent an email entitled "Fwd: Draft JV Ag- ASAP Prop & Sporty Beans to Ramesh. It read:

"Hi,

I have gone through the agreement and it looks ok. Please get one more advice from your lawyer and after that we can go ahead."

19. In early November, Gerry was instructed by Chaks to work on the new e-portal for the plaintiff. Thereafter, Ramesh and Gerry began to exchange emails for the proposed e-portal design and development.
20. On 5 January 2017, Gerry sent a whatsapp message to Chaks (exhibit P22) that was in these terms:



“We kept our part of the agreement and everything up.

This, without Ramesh making any payments to AP as per agreement.”

21. On 6 January 2017, Ramesh sent an email to Chaks which stated among others:

“To the Chairman and Directors of Asap Berhad, Chaks this morning threatened to bring down skola.my and he has done it”...The courts will decide if AB or AP or both are liable.”

22. By letter dated 9 January 2017, Asap Properties issued a termination letter which insofar as material read:

“RE: TERMINATION OF JOINT-VENTURE
AGREEMENT BETWEEN ASAP PROPERTIES
SDN BHD AND SPORTY BEANS SDN BHD

We refer to the matter above.

2. First and foremost, we wish to state for the record the following:



- (i) You had approached us to design, build, deploy and launch an e-portal (“E-Portal”) to offer sporting goods and service and also for other goods and services over the internet wherein we had agreed to do the same on a Joint-Venture basis (“Proposed JV”) between both of us wherein you were to fund the Proposed JV and we were to design, build, deploy and launch the said “E-Portal which we were both supposed to jointly manage the same thereafter.
- (ii) In view of the same we had drafted a Joint-Venture Agreement to incorporate the terms of the Proposed JV (“JV Agreement”) whereupon among the salient terms and conditions are as follows:
 - (a) Upon the execution of the said JV Agreement, a joint venture company (hereafter to be called “the JV-Co”) was to be set up at your cost, to own and manage



the said E-Portal wherein you were to hold 70% and we were to hold the balance 30% of the equity in the said JC-Co;

(b) Upon the execution of the said JV Agreement you were to pay us the amount of RM50,000.00 being the deployment cost and also to provide funding of RM20,000.00 per month for the operational cost for operating the E-Portal for period of 1 year after the launch;

(c) Once the E-Portal was launched the said Portal would be owned by the JV-Co and which was to be jointly managed by both ASAP Properties Sdn Bhd and Sporty Beans Sdn Bhd through the JV-Co.

(iii) Your director, Ramesh Chelliah had approved the terms and conditions of the draft JV Agreement sent to him on or about the 26.10.2016 and



thereafter our representative signed
2 copies of the same and we were
waiting for you to execute, stamp
and return us a copy of the said JV
Agreement, but the same was never
delivered to our office in Kelana Jaya
till date.

(emphasis added)

3. Although we were still waiting for you to deliver us the executed and stamped JV Agreement, nevertheless, on your behest, our team consisting of Gerry Pillai and others started to work on the E-Portal and proceeded to create a working E-Portal to show the proof of concept and for testing purposes.
4. Since then we were wish to note the following:
 - (i) Not only do we do not have an executed and stamped copy of the JV Agreement in our records, we have yet to receive any news regarding the JV-Co which was to be



set up by your pursuant to the said JV Agreement;

- (ii) Further, although our team has gone on to design and produce a working E-Portal to demonstrate the proof of concept ("Working E-Portal") and uploaded content for production live on the 19.12.2016 for testing purposes, nevertheless we, ASAP Properties Sdn Bhd have yet to receive the RM50,000.00 which was supposed to be paid to us upon the execution of the said JV Agreement;
- (iv) We have just discovered that you had illegally and without our consent, induced poached our Gerry Pillai by offering a job in your company although you, through your director, Ramesh Chelliah knew full well that the said Gerry Pillai is working for us in respect of the E-Portal which is a contravention of the spirit of the proposed JV and JV Agreement, if not a legal breach of the same;

.....



10. We wish to place on record that ASAP Properties Sdn Bhd is not a subsidiary of ASAP Berhad and neither is ASAP Berhad a shareholder of ASAP Properties Sdn Bhd. As such ASAP Berhad has nothing to do with the JV Agreement or Proposed JV between you and us or with regards to anything to do with the E-Portal for that matter.

13. Take note of the above accordingly.

Yours faithfully,
ASAP Properties Sdn Bhd

.....
(Prabuddha Kumar Pronob Chakraverty
Director

23. By letter dated, 25 January 2016, the plaintiff's solicitors responded denying all the allegations made in Chak's letter. The letter, inter-alia, stated:

(a) The Joint VENTURE JV Agreement in actual fact is for a profit sharing in the ratio 70% (our client), 30% (ASAP) and there never was any condition in the JV Agreement to set up a JV Company to jointly



manage the said E-Portal as stated in your aforesaid Letter. We also wish to reiterate that the JV Agreement and profit sharing arrangements was at all material times agreed between Sporty Beans Sdn Bhd and ASAP Berhad and not as alleged by you at paragraph 10 and 11 of your aforesaid letter;

- (b) Therefore, our client is of the view that you are in no position to shut down the E-Portal and or to correspond with our client as you have stated in your letter that ASAP Properties Sdn Bhd is not a subsidiary of ASAP Berhad and neither is ASAP Berhad a shareholder of ASAP Properties Sdn Bhd as it is irrelevant. It is our client position that at no material time, were you involved in the JV Agreement with our client since the E-Portal was set up by our clients at their own cost and is fully managed and operated solely by our clients;
- (c) Furthermore, the allegation of payment of RM50,000.00 is baseless and misconceived as there were no such agreement by our client to the same with ASAP Berhad as all



cost of operating the said E-Portal was borne by our client;

- (d) If there is any payment to be made under the said JV Agreement, such payment is only due until after 6 months of implementing the JV and or when the E-Portal is set up and fully operational for a period after 6 months to 1 year including generating profits at the ratio mentioned above;
- (e) The JV Agreement has been signed by our client and our client have returned the JV Agreement to ASAP Berhad in November 2016 for stamping and until to date, our client have yet received the duly stamped JV Agreement for their record and safe keeping. Accordingly, your allegations in paragraph 2, 3 and 4 (i) of your aforesaid letter is denied;
(emphasis added)

24. In June 2017, the plaintiff instituted this action against Asap Berhad and Asap Properties.



Trial

25. The trial took place over a period of 18 days. A total of 7 witnesses testified. The plaintiff called Foo Mun Lee and Ramesh, whilst Mohamad Shaharul bin Mohd Shariff ("Shaharul") testified on behalf of Asap Berhad. Asap Properties called Chia Siew Hoong ("Damien"), Alan Michael Rozarion ("Alan") and Chaks. Gerry gave evidence as the fourth defendant in the counterclaim.
26. The 2 JV agreements (in the bundle of documents were marked as P8 and ID 37, respectively) are identical save and except for clause 2.2. They show that the contracting parties to the JV agreement are the plaintiff and Asap Properties.

Witnesses

27. The plaintiff's account of the relevant facts emerged through the evidence of Ramesh and the defendants account through the evidence of Chaks and Allan. I shall therefore deal only with the evidence of these witnesses and Gerry. They were the principal witnesses in this case. Their accounts as to who were the parties to this JV agreement, what were the agreed terms, and execution of the final JV agreement, are diametrically opposed.

Ramesh's version

28. According to Ramesh, he had requested Chaks for the JV agreement to be between the plaintiff and Asap Berhad. Chaks agreed. It was further agreed that there would be no upfront costs



involved for the plaintiff for the creation of the e-portal, and that the plaintiff would pay Asap Berhad, 30% from the net profits.

29. Ramesh denied there was any agreement reached about the formation of a joint venture company between him and Chaks as alleged by the letter in the letter of 9 January 2017 (at [21] and statement of defence).
30. Ramesh also acknowledged that on 26 October 2016 Allan had emailed to him a draft agreement that purported to be between Asap Properties and the plaintiff. He clarified with Chaks who informed him to ignore the draft and that Gerry would be bringing the actual JV agreement on terms that had been agreed between them earlier in October.
31. He testified that it was the team from Asap Berhad that had communicated with him via email using Asap Berhad's email address and worked with him to develop the e-portal.
32. Continuing with his testimony, Ramesh said that sometime in late November 2016, Gerry came to his house with a JV agreement prepared by Asap Berhad. He and Usha Devi signed both the copies for and on behalf of the plaintiff and their signatures were attested by Gerry. He then handed over the JV agreement to Gerry to be brought to Chaks for execution and stamping. He stated he is not in possession of the JV agreement as the duly executed and



stamped agreement was never returned to the plaintiff by Asap Berhad.

33. He also denied that the draft agreement marked as ID37 was the draft agreement that was emailed to him by Allan. Ramesh also denied that Prabu had sent him any attachment via his email (at [17]).
34. He said further that the e-portal was disabled on the instructions of Chaks in breach of the JV agreement.

Chaks version

35. According to Chaks, all the terms and conditions in respect of the JV agreement had been agreed with Ramesh before 21 October 2016. Ramesh had agreed the plaintiff would pay RM50,000.00 upon the execution of the JV agreement and that a JV company would be set up to manage the e-portal. He admitted that he did not send an email to Ramesh to confirm what had been agreed.
36. Chaks stated that Ramesh approved the terms and conditions as set out in the draft agreement that was sent via email by Allan on 26 October 2016. Prabhu then went to Ramesh's house, picked up the signed JV agreement and came to see him and he signed it in Prabhu's presence. After signing it, he returned the signed copies to Prabhu for the same to be stamped by Ramesh as provided in the JV agreement.



37. Chaks denied that he had instructed Gerry to disable the e-portal.

Alan's version

38. According to Alan, he was introduced to Ramesh by Chaks sometime in October 2016. He was instructed by Chaks to draft a joint-venture agreement between Asap Properties and the plaintiff. Chaks explained to him that Asap Properties was tying up with the plaintiff to do an e portal called My Juara, which was to be similar in nature to Asap Properties previous successful e-portal which he had drafted for the KPD Mall. Chaks also requested him to use the KPD Mall templates for the proposed joint-venture agreement to be drafted and eventually signed.
39. Continuing with his testimony, Alan stated that the salient terms of the agreement he drafted was for a joint-venture between the plaintiff and Asap Properties on a 70%: 30% basis to own and control the proposed e-portal, whereby the plaintiff will own 70% and Asap Properties will own the remaining 30% of the e-portal. Asap Properties will develop and launch the proposed e-portal but the e-portal will be jointly managed by both Asap Properties and plaintiff. The plaintiff was to come up with all the financing required for the same including the amount of RM50,000.00 being the anticipated costs of deploying and launching the e-portal.
40. Allan also maintained that he did not draft any other agreement thereafter in respect of this joint venture.



Gerry's version

41. I now turn to Gerry's evidence. He was the key player in setting up the e-portal under the name skola.my. It was his evidence that the JV agreement was intended to be between the plaintiff and Asap Berhad. According to Gerry, he instructed Damien to shut down the e-portal on Chak's instructions.
42. Gerry denied that he had gone to Ramesh's house with a copy of the JV agreement for the latter to execute. He asserted that he had nothing to do with the preparation, delivery and attestation of the JV agreement.
43. He admitted having affirmed a statutory declaration on 18 January 2017 stating that the joint venture was between the plaintiff and Asap Properties. The material parts of his statutory declaration was to this effect:
 - (2) On or around October 2015 I was seconded to ASAP Berhad's associate company, ASAP Properties Sdn Bhd (Company No.: 1070059-T) a company incorporated in Malaysia under the Companies Act 1965 and having its address at F-06-3, Plaza Kelana Jaya, Jalan SS7/13A, 47301 Petaling Jaya, Selangor Darul Ehsan (referred as the said "ASAP Properties") to work on their E-commerce business more



specifically the KPD Mall” E-Portal project for the police co-operative;

- (3) On or around 9.11.2016, I was asked by Mr P. Chakravetty (“Chaks”), a director of ASAP Properties to work on a new e-portal (“E-Portal”) for a new client called Sporty Beans Sdn Bhd (Co No.: 1169554-D) (“Sporty Beans”). I then met the director of Sporty Beans, a Mr Ramesh Chelliah (“Ramesh”) and begin to start working on the said E-Portal;
- (4) However, shortly after starting work on the said E-Portal, the said Ramesh approached me to join Sporty Beans as their management consultant to create and deploy the said E-Portal under them although they knew that the said E-Portal was supposed to be a joint venture between Sporty Beans and ASAP Properties where the said E-Portal was to be owned and managed by a joint-venture company (“JV-Co”) to be set up by Sporty Beans for this purpose;



- (5) The said Ramesh convinced me by promising me some money upfront and subsequently when the said E-Portal was deployed, Sporty Beans offer me a salary of RM35,000.00 plus other benefits;
- (6) I was convinced by the said Ramesh's promises. I then deployed other staff to work together with me on this. On the 21.11.2016, I was given an agreement to work as a management consultant for Sporty Beans for the said E-Portal and in and around December 2016, he also paid me RM2,500.00 in cash;
- (7) On Ramesh's behest and above promises, we started to work on the said E-Portal where he used the system created for KPD Mall to produce a working E-Portal. I was convinced to provide some of KPD Mall's vendors and new vendors to the said Ramesh who then asked me to contact the said vendors to seek their permission to upload their products and services (as in the KPD Mall) to the new E-Portal so that we could test the said E-Portal. The said E-Portal created for Sporty Beans was called



www.skola.my (“Skola E-Portal”) where the domain name was registered under Ramesh Chelliah’s personal name;

- (8) We then began doing the production live (for testing purposes only) for the said E-Portal and on the 19.12.2016, we tested the said E-Portal and on or about the 3.1.2017, after testing the said E-Portal we took down (disabled) some of the content of the said E-Portal where there were no letters of authorization from the vendors;
- (9) However, on or around 5.01.2017, the said director Ramesh got angry and first requested for the content which was taken down or to be put up back and before I could respond he informed should the content not be put up he will consider if an act of sabotage of the Skola E-Portal by ASAP Berhad and threatened to take legal action against ASAP Berhad;
- (10) On the evening of 5.1.2017, I contacted Mr Chaks and informed him of the following:



- i. That Ramesh Chelliah of Sporty Beans had offered me a job in his company although I was still working with ASAP Properties; and
 - ii. That I was paid a sum of RM2,500.00 by him to help Sporty Beans put up the Skola E-Portal without involving ASAP Properties;
 - iii. With regards to the E-Portal which was supposed to be owned by the JV-Co, the said Ramesh convinced me to use ASAP Properties resource to deploy a working E-Portal for Sporty Beans.
44. According to Gerry, he was coerced to make the statutory declaration by Chaks, and for this reason he had not used his usual signature to sign the same. When asked to explain the nature of the coercion, his testimony was, “so when I was in the meeting with him (Chaks), he basically said “..I’ve got to worry about my kids because they are young ..and this is going to get ugly and everthing, will regret ... there are a lot of people behind it that would not take



this case too lightly and I've got to be worried about it. It's struck me as a bit of threat ..told me that I had no choice but to get it signed and follow Alan to the commissioner of oaths to get it signed."

45. It was only some 2 1/2 years later, specifically on 4 July 2019, Gerry lodged a police report alleging that he was forced under duress by Chaks to sign the aforesaid statutory declaration. His allegation of coercion is unconvincing.
46. It also bears mention that though in his evidence Gerry alleged that the joint venture agreement was between the plaintiff and Asap berhad, he did not proffer any reasonable explanation as to why he had sent an email (at [23]) to Chaks on 5 January 2017 that Ramesh had not made any payment to Asap Properties as per agreement. If indeed his evidence is true, it is unlikely that he would have referred to Asap Properties in his email.
47. I find Gerry to be an unsatisfactory and obviously unreliable witness whose evidence did not inspire confidence.

Issues

48. The following main issues arise from the pleadings and the evidence:
 - a. Whether a JV agreement came into existence at all?



- b. If yes, who were the contracting parties and what were the terms?
- c. Whether there was a breach of the JV agreement?
- d. Whether Asap Properties counterclaim proven?
- e. Whether Gerry's counterclaim proven?

Whether a JV agreement came into existence at all

- 49. The parties take the position that they exits a JV agreement in respect of the creation of the e-portal. However, there is a material disagreement as to whether the agreement was between the plaintiff and Asap Berhad or the Plaintiff and Asap Properties and what were the agreed terms.
- 50. It is pertinent to note that no signed JV agreement has been produced in court though the parties allege it exists. The plaintiff asserts it is in the possession of the defendants and the defendants assert it is in the possession of the plaintiff. In my opinion, notwithstanding the position taken by the parties, the court is not bound by what the parties say when the evidence points the other way. The court should not impose binding contracts on the parties which they have not reached.



51. In my view, the central issue here is whether a JV agreement had come into existence at all. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. See **British Steel Corp v Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504**.
52. A contract will not be concluded unless the parties are agreed as to its material terms. There must be 'consensus ad idem'. Whether the parties have reached agreement on the terms is not determined by evidence of the subjective intention of each party. It is, in large measure, determined by making an objective appraisal of the exchanges between the parties.
53. I turn now to examine the correspondences between the parties. It will recalled that Prabhu had on 21 October sent an email to Ramesh (at [14]) that read, "I spoke to Chaks and he is busy leaving to overseas. He will sort it out your whatsapp message and move forward. By next week Monday Allan will look into it the agreement between Sporty Beans and Asap Berhad to be modified accordingly." This suggests that the parties intended the JV agreement to be between the plaintiff and Asap Berhad.



54. The next piece of important evidence is Allan's whatsapp message (at [15]) to Ramesh on the 25 October 2016. It clearly shows that the terms were still being negotiated as Ramesh for the first time is informed about the formation of a JV company. It is unclear as to why, contrary to Prabhu's email to Ramesh (at [14]), Allan then on 26 October 2016, had emailed a draft agreement between the plaintiff and Asap Properties to Ramesh.
55. There is no documentary evidence to show whether Ramesh had objected to the parties and terms stated in the draft written agreement. It will be recalled that according to Ramesh, the said draft agreement was amended and the final agreement was brought to him for his signature.
56. Next, and crucially, both parties assert that a final JV agreement exists, but the same has not been produced. They also assert it is in the possession of the other. If it does exists, it is odd that there is no evidence to show who had prepared or printed final JV agreement for the parties to sign. According to Ramesh, Gerry brought the final JV agreement to him, but this has been denied by the latter. Chaks, on the other hand, did not give evidence on this aspect of the case. Allan testified that he did not prepare the final JV agreement.
57. It is the plaintiff's pleaded case, at paragraph 8.3 of the Statement of Claim, that "two copies of the joint venture agreement so prepared by the first defendant were then delivered by the first



defendant's chief operating officer Gerard Mohanraj Pillai ("Gerry") to Ramesh sometimes in late November 2016, and Ramesh thereupon signed both the copies for and on behalf of the plaintiff ad handed over the same to Gerry to be brought to the first defendant's director Chaks for execution and stamping."

58. Ramesh testified as to these facts in his evidence. However, Gerry gave evidence that he did not deliver any written agreement to Ramesh nor attest the latter's signature. The relevant portions of Gerry's evidence is as follows:

"HTS": So you agree with me, have you never seen any agreement between ASAP Bhd and Sporty Beans in relation to skola.my? You have not seen any such document.

Gerrard: Yes, I can say that, yes.

MES: Alright, now it is my client's instruction, Mr Ramesh that under his witness statement at question 25, he mentioned that this joint venture agreement was actually brought by you to him sometime in late November delivered by you to him in late November, and thereupon he signed



both copies of this agreement and he handed it back to you. Now, do you recall this incident of the agreement being signed by Mr Ramesh, brought by you to Ramesh and he signed and gave it back to you, late November 2016?

Gerard: No.

MES: No. Do you recall, meeting Ramesh sometimes in late November to sign this agreement for him, to bring this agreement for him to sign?

Gerard: No.

MES: You don't recall? You don't recall or you don't know?

YA: No, he is saying no, he did not do that.

Gerard: Yes.

MES: Sorry.

Gerard: My recollection it never happened.



59. It is clear from the foregoing that Ramesh's version of the facts pertaining to the existence and execution of the final JV agreement and its whereabouts is directly contradicted by Gerry.
60. I turn now to the defendants case on this issue which rests mainly on Chaks evidence. According to Chaks he had signed the JV agreement when it was brought to him by Prabhu after Ramesh had signed it. After signing the JV agreement, he returned it to Prabhu who had given it to Ramesh for stamping.
61. However, in his letter of termination of the JV agreement dated 9 January 2017 (at [21]) Chaks has stated:

"Ramesh Chelliah had approved the terms and conditions of the draft JV Agreement sent to him on or about the 26.10.2016 and thereafter our representative signed 2 copies of the same and we were waiting for you to execute, stamp and return us a copy of the said JV Agreement, but the same was never delivered to our office in Kelana Jaya till date."

62. It is clear that Chaks has given two inconsistent versions as regards the execution of the JV agreement. In any event, even if Chaks version in court is true, then Prabhu would have been able to corroborate his testimony and refute Ramesh's version. But,



Prabhu, a key witness, was not called to testify and no explanation has been proffered for this omission.

63. Section 114, illus (g) of the Evidence Act 1950 states that "the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". It is settled law that where no explanation is given for not calling a material witness, the court can presume that if this material witness had been called, his evidence would have been unfavourable.
64. In the circumstances, it was the plaintiff's submission that an adverse inference should be drawn against the defendants for their omission to call Prabhu, on the presumption that if called, Prabhu's evidence would not have been favourable to the defendants. I agree. See **Engku Dato' Ibrahim Petra Bin Tengku Indra Petra V Petra Perdana Bhd And Another [2018] 2 MIJ 177**.
65. Taking into consideration these facts, and absent a signed written agreement, I am satisfied that this is a case where a contract was being negotiated subject to contract and work began before an agreement had come into existence. The evidence shows that the parties had agreed that the work on the e-portal should proceed before the formal written JV agreement was executed in accordance with the parties' common understanding.



66. I am unable to agree with the plaintiff's submission that merely because the persons who worked on the e-portal were Asap Berhad's staff and they had used Asap Berhad's email address to communicate with Ramesh, warrants an inference that the contracting parties were the plaintiff and Asap Berhad. It is true that Gerry, the main person in relation to the creation of the e-portal asserts that the JV agreement was between the plaintiff and Asap Berhad, but oddly, on 5 January 2017, he had sent a whatsapp message to Chaks complaining that Ramesh had failed to make payment to Asap Properties as per agreement.
67. In my judgment, no JV agreement had come into existence at the material time. It follows that both the plaintiff's claim, and Asap Properties counterclaim, which are both premised on the existence of a JV agreement must fail.

Gerry's counterclaim

68. I must now deal with Gerry's counterclaim for damages for emotional stress from the act(s) of the Asap Properties in instituting this suit against him. I dismiss the claim as there is no evidence that Asap Properties was actuated by malice in bringing this suit against him.

Conclusion

69. For the reasons given, I dismiss the plaintiff's claim against Asap Berhad and Asap Properties and Asap Properties counterclaim



against the plaintiff, Ramesh, Usha Devi and Gerry. There shall be no order as to costs.

70. I also dismiss Gerry's counterclaim against Asap Properties with no order as to costs.

Dated: 24 February 2023



(S.M KOMATHY SUPPIAH) —
Judge
High Court of Malaya
Shah Alam

Date of Decision: 21 February 2023

Solicitors:

Main Suits:

Plaintiff: Dato' Muralee Menon, [Messrs M. Menon & Partners]

First defendant: Dato' Hariharan Tara Singh, [Messrs T.S. Hariharan & Partners]

Second defendant: Mahendra Mahason & Enoveetha Bhaskaran, [Messrs Sree Harry & Co.]



Counter Claim:

Plaintif: Mahendra Mahason & Enoveetha Bhaskaran, [Messrs Sree Harry & Co.]

First defendant: Dato' Muralee Menon, [Messrs M. Menon & Partners]

Second and third defendant: Maurice Scully, [Messrs M. Scully]

Fourth defendant: Matthew Jeremy Van Huizen, [Messrs Joseph & Partners]

